INDEX

	Page
Opinion below	1
Jurisdiction	1
Question presented	2
Statute involved	2
Statement	5
Summary of argument	15
Argument:	
I. Gaston County's enforcement of the North Carolina literacy test during the five years preceding the filing of this action had a discriminatory effect on the right of its Negro citizens to vote	18
A. Gaston County was required to establish that its prior enforcement of a literacy test did not have the effect of abridging the right to vote on racial grounds	18
B. The district court properly concluded that the use of a literacy test in Gaston County, where Negroes now of voting age were discriminatorily afforded inferior and inadequate educational opportunities, had the effect of abridging the right of Negroes to vote on account of race	24
C. The manner in which the literacy test was administered had the effect of curtailing Negro registration without holding white registration within comparable limitations	31
II. Gaston County failed to meet its burden of proving that enforcement of the literacy test by municipal registrars operating within its territorial limits did not have a discriminatory purpose or effect	37
Conclusion	43

338-794—69——1

CITATIONS

Cases:

	Page
Allen v. *State Bd. of Elections*, Nos. 3, *et al.*, this Term, decided March 3, 1969	6, 22
Apache County v. *United States*, 256 F. Supp. 903	31, 37
Bazemore v. *Bertie County Bd. of Elections*, 254 N.C. 398, 119 S.E. 2d 637	11, 24, 32, 33
Carrington v. *Rash*, 380 U.S. 89	18
Franklin v. *Parker*, 223 F. Supp. 724, modified, 331 F. 2d 841	28
Gomillion v. *Lightfoot*, 364 U.S. 339	28
Gray v. *Sanders*, 372 U.S. 368	23
Guinn v. *United States*, 238 U.S. 347	28
Hadnott v. *Amos*, No. 647, this Term, decided March 25, 1969	6, 40
Harman v. *Forssenius*, 380 U.S. 528	18
Harper v. *Virginia Bd. of Elections*, 383 U.S. 663	18
Katzenbach v. *Morgan*, 384 U.S. 641	18
Lane v. *Wilson*, 307 U.S. 268	28, 29
Lassiter v. *Northampton County Bd. of Elections*, 360 U.S. 45	23
Reynolds v. *Sims*, 377 U.S. 533	18
Seller v. *Trussell*, 253 F. Supp. 915	20
South Carolina v. *Katzenbach*, 383 U.S. 301	7, 15, 19, 20, 22, 23, 24, 26, 31, 32
Terry v. *Adams*, 345 U.S. 461	29
Udall v. *Tallman*, 380 U.S. 1	40
United States v. *Alabama*, 252 F. Supp. 95	20
United States v. *Cox*, 11 Race Rel. L. Rep. 269	42
United States v. *Duke*, 332 F. 2d 759	42
United States v. *State of Louisiana*, 225 F. Supp. 353, affirmed, 380 U.S. 145	31, 42
United States v. *State of Mississippi*, 229 F. Supp. 925, reversed, 380 U.S. 128	28
United States v. *Mississippi*, 256 F. Supp. 344	40
United States v. *State of Texas*, 252 F. Supp. 234, affirmed, 384 U.S. 155	28
Wesberry v. *Sanders*, 376 U.S. 1	18
Yick Wo v. *Hopkins*, 118 U.S. 356	18

	Page
Constitution:	
United States Constitution: Fifteenth Amendment	15, 16, 28, 29, 31
North Carolina Constitution:	
Art. VI, §4	9, 32
Art. IX, §2	24
Statutes:	
Civil Rights Act of 1964, as amended by the Voting Rights Act of 1965:	
Section 101(a) (42 U.S.C. 1971(a)	42
Section 101(a)(2)(A), 79 Stat. 437, (42 U.S.C. 1971(a)(2)(A)))	7
Voting Rights Act of 1965, 42 U.S.C. 1973 *et seq.*:	
Section 4 (42 U.S.C. (Supp. III) 1973b)	2, 16, 17, 19, 20, 23, 28, 38, 40
Section 4(a) (42 U.S.C. 1973b(a))	1, 5, 6, 19, 35, 36, 39
Section 4(c) (42 U.S.C. 1973b(c))	5, 19
Section 4(d) (42 U.S.C. 1973b(d))	36, 37
Section 5 (42 U.S.C. 1973c)	6, 40
Section 15(a) (42 U.S.C. 1971(a)(2)(A))	42
42 U.S.C. 1974	12
28 U.S.C. 1253	1
28 U.S.C. 2284	1, 6
North Carolina General Statutes:	
Section 160–364	9
Section 160–365	9
Section 160–366	9
Section 163–28	9, 32
Section 163–31.1	9
Section 163–31.2	10
Section 163–31.3	9
Miscellaneous:	
Biennial Reports of the Superintendent of Public Instruction of North Carolina	14, 25
111 Cong. Rec. 5363	29
111 Cong. Rec. 15881	29
111 Cong. Rec. 16035	29
111 Cong. Rec. 16274	29
Hearings on H.R. 6400 Before Subcommittee No. 5 of the House Committee on the Judiciary, 89th Cong., 1st Sess	21, 22, 39

Miscellaneous—Continued

	Page
Hearings on S. 1564 before Senate Committee on the Judiciary, 89th Cong., 1st Sess	21, 39
H. Rep. No. 439, 89th Cong., 1st Sess	19, 22
S. Rep. No. 162, 89th Cong., 1st Sess., Pt. 3	21, 39
45 C.F.R. §801.204	40
31 Fed. Reg. 5080	5

In the Supreme Court of the United States

OCTOBER TERM, 1968

No. 701

GASTON COUNTY, NORTH CAROLINA, APPELLANT

v.

UNITED STATES OF AMERICA

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

BRIEF FOR THE UNITED STATES

OPINION BELOW

The opinion of the district court (A. 441–472) is reported at 288 F. Supp. 678.

JURISDICTION

The order of the three-judge district court denying declaratory relief was entered on August 16, 1968. A notice of appeal was filed on September 13, 1968, and the jurisdictional statement was filed on October 31, 1968. This Court noted probable jurisdiction on January 13, 1969 (393 U.S. 1011). Jurisdiction of this appeal rests on 28 U.S.C. 1253, 2284, and 42 U.S.C. 1973b(a).

QUESTION PRESENTED

Gaston County, North Carolina, became subject to the Voting Rights Act of 1965 in March 1966 and then ceased administering the State literacy test for voting registration. Although five years have not elapsed since the literacy test was applied, Gaston County is entitled to exemption from the interdictions of the Act if it can show that the use of the literacy test in the County during the five years preceding the filing of this suit had neither the purpose nor the effect of denying or abridging the right of Negro citizens to vote on account of their race.

The question presented is whether Gaston County has made that showing in light of (1) evidence of inferior and inadequate educational opportunities previously afforded Negroes now of voting age by the County school system, (2) evidence that many white residents now registered to vote in the County were not required to pass the literacy test, and (3) the failure of the plaintiff to make any submission with respect to the administration of the literacy test by the independent voting officials of several municipalities located within the territory of the County.

STATUTE INVOLVED

Section 4 of the Voting Rights Act of 1965 (42 U.S.C. (Supp. III) 1973b) provides in relevant part (emphasis added):

> (a) To assure that the right of citizens of the United States to vote is not denied or abridged on account of race or color, no citizen shall be denied the right to vote in any Federal, State, or local election because of his failure

to comply with any test or device in any State with respect to which the determinations have been made under subsection (b) or in any political subdivision with respect to which such determinations have been made as a separate unit, **unless the United States District Court for the District of Columbia in an action for a declaratory judgment brought by such State or subdivision against the United States has determined that no such test or device has been used during the five years preceding the filing of the action for the purpose or with the effect of denying or abridging the right to vote on account of race or color:** *Provided,* That no such declaratory judgment shall issue with respect to any plaintiff for a period of five years after the entry of a final judgment of any court of the United States, other than the denial of a declaratory judgment under this section, whether entered prior to or after the enactment of this Act, determining that denials or abridgments of the right to vote on account of race or color through the use of such tests or devices have occurred anywhere in the territory of such plaintiff.

An action pursuant to this subsection shall be heard and determined by a court of three judges in accordance with the provisions of section 2284 of title 28 of the United States Code and any appeal shall lie to the Supreme Court. The court shall retain jurisdiction of any action pursuant to this subsection for five years after judgment and shall reopen the action upon motion of the Attorney General alleging that a test or device has been used for the purpose or

with the effect of denying or abridging the right to vote on account of race or color.

If the Attorney General determines that he has no reason to believe that any such test or device has been used during the five years preceding the filing of the action for the purpose or with the effect of denying or abridging the right to vote on account of race or color, he shall consent to the entry of such judgment.

(b) The provisions of subsection (a) shall apply in any State or in any political subdivision of a state which (1) the Attorney General determines maintained on November 1, 1964, any test or device, and with respect to which (2) the Director of the Census determines that less than 50 per centum of the persons of voting age residing therein were registered on November 1, 1964, or that less than 50 per centum of such persons voted in the presidential election of November 1964.

A determination or certification of the Attorney General or of the Director of the Census under this section or under section 6 or section 13 shall not be reviewable in any court and shall be effective upon publication in the Federal Register.

(c) The phrase "test or device" shall mean any requirement that a person as a prerequisite for voting or registration for voting (1) demonstrate the ability to read, write, understand, or interpret any matter, (2) demonstrate any educational achievement or his knowledge of any particular subject, (3) possess good moral character, or (4) prove his qualifications by the voucher of registered voters or members of any other class.

(d) For purposes of this section no State or political subdivision shall be determined to have engaged in the use of tests or devices for the purpose or with the effect of denying or abridging the right to vote on account of race or color if (1) incidents of such use have been few in number and have been promptly and effectively corrected by State or local action, (2) the continuing effect of such incidents has been eliminated, and (3) there is no reasonable probability of their recurrence in the future.

STATEMENT

1. Section 4(a) of the Voting Rights Act of 1965 (42 U.S.C. (Supp. III) 1973b(a)) suspends the use of literacy tests—as well as all other "tests or devices" as defined in Section 4(c) of the Act (42 U.S.C. (Supp. III) 1973b(c))—as a prerequisite for voting registration or voting in any federal, state, local or other election in any state, county or other political subdivision which then used such a voting test and in which fewer than 50 percent of the persons of voting age were registered for or voted in the 1964 presidential election. On March 29, 1966, the Attorney General and the Director of the Census made the appropriate statutory certifications with respect to Gaston County (along with certain other North Carolina counties), and it became subject to the restrictions of the Act (31 Fed. Reg. 5080–5081; A. 12).[1] Section 4(a) fur-

[1] Although the Act became effective August 6, 1965, and the necessary certifications were promptly made with respect to the States affected as a whole, the application of the statute to individual counties—like Gaston County and other North Carolina counties—had to await the results of a special census.

ther provides, however, that the suspension of voting tests shall terminate if the United States District Court for the District of Columbia, sitting as a three-judge panel pursuant to 28 U.S.C. 2284, determines, in a declaratory judgment action brought against the United States, that no such test or device has been used within the state or political subdivision seeking exemption during the five years preceding the filing of the action for the purpose or with the effect of denying or abridging the right to register to vote or vote on account of race or color. That is the provision invoked here.[2]

This suit was brought by Gaston County on August 16, 1966. The complaint (A. 1–9) makes the requisite allegations as to nondiscriminatory use of a literacy test during the five years preceding the institution of this case (A. 5–6). The United States, in answering this complaint (A. 9–11), denied the material allegations and alleged that, during the period when the North Carolina literacy test was pur-

[2] It should be noted that a successful action for declaratory relief under Section 4(a) has other consequences besides allowing the plaintiff to reinstitute old voting tests—if there is no independent bar (see note 28, *infra*). Notably, the prohibition on new voting standards and procedures without prior judicial approval, imposed on covered states and subdivisions by Section 5 of the Act, is then lifted. See *Allen* v. *State Bd. of Elections*, Nos. 3, *et al.*, this Term, and companion cases, decided March 3, 1969; *Hadnott* v. *Amos*, No. 647, this Term, decided March 25, 1969. So, also, the government's authority to appoint federal examiners and observers under Sections 6 and 8 of the Act ceases with respect to a state or subdivision which has secured exemption pursuant to Section 4(a).

portedly in effect in Gaston County, many white citizens, including illiterates, had been permitted to register without being required to demonstrate their literacy. Reintroduction of literacy requirements, the government noted, would thus violate Section 101(a) of the Civil Rights Act of 1964, as amended in 1965 (42 U.S.C. 1971(a)(2)(A)) (ibid.).

The case was tried on June 21 and 22, 1967, before Circuit Judges Wright and Robinson and District Judge Gasch. On August 16, 1968, the court denied Gaston County's application for declaratory relief (A. 441–472). Judges Wright and Robinson, finding that "Negroes of voting age in Gaston County were, as children, denied a public education equal to that provided white children" (A. 456), concluded that (A. 457–458):

> * * * [I]n addition to denying Negroes equal educational opportunity as a matter of law through racial segregation, Gaston County has also denied Negroes that same opportunity as a matter of fact. Moreover, since Gaston County has not refuted any of this evidence, *South Carolina* v. *Katzenbach* [383 U.S. 301, 332], we must agree with the Government's position that any literacy test imposed upon Negroes as a precondition to voting would have the effect of abridging the right of many Negroes to vote on account of race or color.

Judge Gasch concurred in the result, reasoning that (A. 465):

> A judgment for the County in this action would reinstate the literacy test for municipal registrars as well as all others in the County.

> The County has made no showing that a literacy test has not been used by municipal registrars in Gaston County in a discriminatory fashion. This failure of proof marks a fatal defect in its case. * * *

2. Gaston County is a political subdivision of the state of North Carolina (A. 12). It is located in the southern portion of the state, west of the city of Charlotte, and it borders on the state of South Carolina. The county seat of Gaston County is the City of Gastonia. As of January 24, 1966—the date of the special census on the basis of which the County was placed under the Act—45,429 of the 135,775 inhabitants of Gaston County, or approximately one-third, resided in the City of Gastonia (Pl. Exh. GG). The remaining two-thirds of the inhabitants of the County resided in small towns and rural areas. The special 1966 census shows that there were approximately 69,252 white persons and 8,407 Negroes of voting age residing in the county (*ibid.*). In June 1967, 43,874, or 63.3 per cent of the white persons, and 4,388 or 52.2 percent of the Negroes, were registered to vote (A. 60).

The County is divided into 43 election precincts, each of which has its own registrar of voters (A. 12). The precinct registrars are appointed by the Gaston County Board of Elections, and this body is generally responsible for the administration of all federal, state, county and township elections (A. 12, 19). There are also at least eleven municipalities in Gaston County which hold separate elections (A. 39). Registration for these municipalities is conducted separately by

municipal registrars (see N.C. Gen. Stat. §§ 160–364, 160–365, 160–366, 163–31.3), and the County Board of Elections has no control over municipal elections (A. 39, 82–83).

North Carolina law provides that every person presenting himself for registration as a voter shall be able to read any section of the North Carolina Constitution in the English language (A. 12; N.C. Const., Art. VI., § 4; N.C. Gen. Stat. § 163–28). It has been the stated policy of the Gaston County Board of Elections to comply in all respects with these provisions (A. 27, 28).[3] Prior to July 1964, it was the Board's practice to give an oral reading test and applicants were required to read the registration oath aloud to the satisfaction of the registrar (A. 23). After the effective date of the Civil Rights Act of 1964, which prohibited the imposition of an oral test as a precondition for voting in a federal election, the Board changed its procedures and prepared a written literacy test for all purposes. Applicants were thereafter required to copy, to the registrar's satisfaction, any one of three sentences from the North Carolina Constitution set forth on a written form prepared by the Board (A. 50–52). In the spring of 1966, after the Attorney General and the Director of the Census had made the statutory determinations which placed Gaston County under the Voting Rights Act, the Board suspended the use of all literacy tests (A. 62–63).

[3] The United States demonstrated, however, that the actual practices of the various registrars have differed significantly from this stated policy, and that there has, over the years, been a widespread waiver of the literacy requirement for white persons (see *infra*, pp. 11–13).

In 1962 the County instituted a so-called "loose-leaf" system of registration and, in order to accomplish the changeover from the "precinct registration" system in effect until that time, the County conducted a general reregistration of all voters (A. 12–13, 16–19; see N.C. Gen. Stat. §§ 163–31.1, 163–31.2). During the course of the reregistration, the local press carried news stories which stated that "literacy, always a requirement for a voter is now being enforced for the first time," and quoted Mr. Mack Davis, then the Chairman of the County Board, as recognizing that this was hard on previously registered voters but that the Board had no lawful alternative (A. 13, 27–28; Govt. Exh. No. 5).

At the time of the 1962 reregistration, all of the registrars in the county system were white (A. 14, 29). In 1965, a Negro, Elsie Saunders, was appointed registrar of predominantly Negro Precinct No. 7 in Gastonia, but all of the other precinct registrars still are white persons (A. 14, 55). In addition, the Board appointed three Negroes as temporary deputy registrars in 1962 to assist in registration in Precinct No. 7 (A. 49, 111).[4] No Negro has ever been appointed a precinct registrar outside the City of Gastonia, or in any predominantly white precinct within the city (A. 14, 55).

[4] While these deputy registrars technically had county-wide jurisdiction (A. 36), it was in predominantly Negro areas in Gastonia that they actually performed their functions (A. 36). Registration in Precinct No. 7 is 82 percent Negro, and in all other precincts in the County it is overwhelmingly white (Govt. Exh. No. 15).

Even with reference to the enforcement of the literacy requirement, the registrars are vested with considerable discretion. Under North Carolina law that discretion includes, *inter alia,* matters such as determining what constitutes a satisfactory demonstration of literacy, who may be exempted from taking the test, and the efforts which should be made to encourage or facilitate registration (compare A. 248–249 with A. 303, 315).[5] In Gaston County, the individual registrars in fact enjoyed even greater discretion with respect to determining what constitutes sufficient literacy than is permitted under state law (A. 29, 31, 72, 75–76, 181–182, 185).

This sweeping discretion was exercised against a backdrop of racial separatism and white domination. During the entire period when the present voting-age population was being educated, the schools in Gaston County were racially segregated (A. 77, 161). In general, Negroes occupied an economic and social position subordinate to that of white persons, and there was very little social mingling between the races (A. 117, 183). The Ku Klux Klan was active in the rural areas of the County (A. 114, 129).

Both before and after the 1962 reregistration, and specifically during the five years predating the institution of this suit, literacy was not, in actual practice, a prerequisite to registration for white persons in Gaston County. Thus, the record reveals that after the reregistration period began in April 1962, and de-

[5] See *Bazemore* v. *Bertie County Bd. of Elections*, 254 N.C. 398, 119 S.E. 2d 637.

spite the public announcement of the Board's policy to enforce the literacy requirement, the registrars frequently ignored or waived the requirement in favor of white persons seeking to register.[4] Numerous illiterate white persons accordingly became registered to vote and are still registered voters in Gaston County. While the literacy test was frequently waived for white persons, no public announcement was made that this was the practice (A. 73). Members of the Negro community in Gaston County, both leaders and ordinary citizens, thus believed that the literacy test was being generally enforced, and therefore no effort was made to encourage illiterate Negroes to attempt to register (A. 110, 163, 314–315, 397, 409–410, 415–418). Indeed, some Negroes, including at least one who was active in voter registration work among Negroes, were told that it would be futile for illiterates to try to register (A. 314–315).

Although county officials failed to comply with their obligation under 42 U.S.C. 1974 to preserve records, and rejected applications have not been retained by them (A. 34), there is evidence that during the five years preceding the filing of this action a number of Negroes were rejected for registration on account of a lack of literacy by both county and municipal regis-

[4] The record contains the depositions of 29 illiterate white voters residing in 18 voting precincts located in all parts of the county (A. 172–178, 186–217, 225–296, 306–313) and a notebook of copies of the applications for egistration of approximately 70 additional white voters, whose forms show that they were incapable of satisfying the North Carolina literacy requirement; all of them were nonetheless registered to vote in Gaston County (Govt. Exh. No. 1).

trars (A. 109, 195, 317, 332–333, 393–394, 395–396, 411–413). While a few illiterate or nearly illiterate Negroes were registered to vote in overwhelmingly Negro Precinct No. 7 in Gastonia (A. 350–383, 428–440) and the evidence showed in general that the County Board made commendable efforts to facilitate registration in this precinct, there was no comparable showing with respect to registration practices outside Gastonia. The county's witnesses were generally without knowledge as to those practices (A. 109, 117, 128, 141), although they did attest to the fact that the racial situation outside Gastonia was not as favorable as that within the city (A. 114, 129).

While there are in Gaston County at least eleven municipalities which themselves control the registration processes for their residents, and which administered the North Carolina literacy requirement for persons seeking to qualify to vote in elections conducted under their auspices, appellant offered no evidence with respect to the registration practices of these municipal registrars. At the trial the Chairman of the County Board of Elections testified that he did not know whether the various municipal registrars considered themselves subject to the Voting Rights Act or were complying with it, and he stated that he had made no effort to acquaint himself with their practices or procedures (A. 82–83). There is, however, some evidence that at least one municipal registrar has refused to register illiterate Negroes since Gaston County was placed under the 1965 Voting Rights Act (A. 317, 393–394, 395–396).

3. The record reveals that the educational opportunities afforded to Negroes during the entire period when persons now of voting age were of school age were substantially inferior to those afforded to white persons in Gaston County. The statistics recited in Judge Wright's opinion (A. 453–456) demonstrate that the County spent significantly less money per capita for each Negro school child with respect to school and classroom facilities and teacher salaries in the pre-1948 period than for his white contemporaries.[7]

A comparison of the statistics as to the levels of educational attainment achieved by whites and Negroes also reveals significant disparities. The district court recites statistics taken from the 1960 census which indicate that twice as many Negroes as whites had no formal education, while 30 percent of the Ne-

[7] Fully 35 percent of the older Negro citizens of the county were attending schools in the pre-1918–1919 period (A. 454). The state's figures for that year show that 98 percent of the white teachers—168 out of 171—but only 5 percent of the Negro teachers—two out of 38—held state teaching certificates. The remaining 95 percent of the Negro teachers held second grade certificates, described in the Biennial Report of the State Superintendent for that year as "the lowest permit issued in the State * * * not a certificate in the proper sense, but merely a permit to teach until someone can be found who is competent to take the place." During this same period, 68 percent of the Negro children, but only 30 percent of the whites, attended one-room rural school houses in which pupils in all grades were taught simultaneously by one teacher. There are no figures on brick or frame structures in 1918, but the state report shows that ten years later, in 1928–1929, 38 of 48 rural schoolhouses for white children were of brick or stone, whereas all 24 rural schoolhouses for Negroes were wooden frame buildings.

groes as opposed to only 17 percent of the whites in the County had a fourth-grade education or less (A. 455–456). While one of appellant's witnesses, Mr. Thebaud Jeffers, principal of the "Negro" high school in Gastonia, testified that in his opinion the education provided at the inferior Negro schools was adequate to prepare the student to pass the North Carolina literacy test (A. 169), other witnesses conceded that the literacy test, even if leniently applied, placed a significant burden on the older Negro citizens of the County (A. 118–119, 132).

SUMMARY OF ARGUMENT

Arising within the context of the Voting Rights Act of 1965, which was designed after lesser expedients had failed to finally eliminate "the blight of racial discrimination in voting" (*South Carolina* v. *Katzenbach*, 383 U.S. 301, 308), this appeal focuses upon the question whether the recent use by Gaston County of a literacy test as a prerequisite for voting registration had the effect of abridging the right under the Fifteenth Amendment of the County's Negro citizens to vote. The district court concluded that Gaston County had failed to refute the government's evidence that the literacy requirement has had that effect. We seek affirmance of that judgment.

First (*infra*, pp. 18–24), we submit that the County must show more than the absence of an improper purpose on the part of its officials. The Voting Rights Act is result-oriented; its aim is to broaden the degree of Negro-citizen participation in the electoral processes

of the covered jurisdictions. It is directed at both the unequal administration of literacy tests and at the fact that such tests are designed to capitalize on the inferior education afforded Negroes now of voting age. If, by reason of lesser opportunities leading to levels of educational attainment below or only bordering on literacy, or by reason of the way in which registration officials administered and enforced the literacy requirement, the test has had a greater impact on Negro registration than white registration, the County is not entitled to removal from the Act's coverage.

Next (*infra*, pp. 24–30), we demonstrate that the district court correctly found that the inferior and inadequate educational opportunities previously afforded Gaston County Negroes now of voting age so burdened them with respect to their ability to perform equally in taking the literacy test that the use of that test as a precondition to voting during the statutory five-year period had the effect of abridging their right to vote on account of race. On this record, the conclusion is compelled that, because of state-imposed educational discrimination, the use of the literacy test made it more difficult for Negroes than whites to register; and, we submit, this had the necessary effect of reducing or abridging the right of Negroes to vote. This result is supported by the principle enunciated in the decisions of this Court construing the Fifteenth Amendment and adopted by the Congress as a justification for the enactment of Section 4 of the Voting Rights Act—that the state may not impose a condi-

tion upon the right to vote which by its own prior conduct it has made it more difficult for a racially distinct group to meet.

We then (*infra*, pp. 31–36) show that, notwithstanding the announced policy of conditioning registration on literacy, County registration officials, in the exercise of a broad delegation of authority to determine, *inter alia*, the individuals who are actually subjected to the literacy test and what constitutes a sufficient demonstration of literacy, routinely registered white illiterates while Negroes were led to believe that the literacy requirement was being adhered to strictly. Noting that the district court did not reach the problems raised by this practice and that this Court need not decide these issues in order to affirm the judgment below, we contend that waiver of the test for some registrants without effectively communicating the fact of that policy to Negroes had a discriminatory effect on the right of Negroes to vote.

Finally (*infra*, pp. 37–42), we argue that the language and legislative history of Section 4 of the Voting Rights Act demonstrate that the certification of Gaston County suspended the use of literacy tests for all elections within its borders. Gaston County offered no evidence as to the practices of the registrars of the municipalities located within its territory. Since a judgment in the county's favor would permit the reintroduction of literacy tests by municipal as well as county registrars, we contend that this lack of evidence constitutes a fatal failure of proof.

ARGUMENT

I. GASTON COUNTY'S ENFORCEMENT OF THE NORTH CAROLINA LITERACY TEST DURING THE FIVE YEARS PRECEDING THE FILING OF THIS ACTION HAD A DISCRIMINATORY EFFECT ON THE RIGHT OF ITS NEGRO CITIZENS TO VOTE

A. GASTON COUNTY WAS REQUIRED TO ESTABLISH THAT ITS PRIOR ENFORCEMENT OF A LITERACY TEST DID NOT HAVE THE EFFECT OF ABRIDGING THE RIGHT TO VOTE ON RACIAL GROUNDS

1. We begin with the admonition voiced by this Court in *Reynolds* v. *Sims*, 377 U.S. 533, 562, that when dealing with matters involving alleged infringements of the right to vote—that basic and essential political right preservative of all others,[8] the right which lies at the very core of our constitutional system[9]—careful and meticulous scrutiny is required. *Accord, Harper* v. *Virginia Bd. of Elections*, 383 U.S. 663, 667, 670. Restrictions on the franchise are not favored and the burden is on those who erect barriers to justify them with compelling reasons. And this applies equally to indirect restrictions. Nor is it enough that bad faith is absent. The right is not to be denied or abridged casually, or incidentally. See, *e.g.*, *Carrington* v. *Rash*, 380 U.S. 89, 96; *Harman* v. *Forssenius*, 380 U.S. 528, 542. Thus, here, the district court was following traditional principles in declining to limit its inquiry to evidence of purposeful discrimina-

[8] See *Yick Wo* v. *Hopkins*, 118 U.S. 356, 370; *Wesberry* v. *Sanders*, 376 U.S. 1, 17–18; *Katzenbach* v. *Morgan*, 384 U.S. 641, 652.

[9] See *Carrington* v. *Rash*, 380 U.S. 89, 96; *Reynolds* v. *Sims*, *supra*, 377 U.S. at 555.

tion directly aimed at abridging the Negro franchise.

This approach is fully applicable to the present controversy. The Voting Rights Act of 1965 was designed to enfranchise millions of citizens who had not been able to secure their Fifteenth Amendment rights under less far-reaching congressional enactments which preceded it. *South Carolina* v. *Katzenbach,* 383 U.S. 301, 308, 313–315. Implementing this broad purpose, Section 4 of the Act (42 U.S.C. 1973b) operates on an objective statistical formula to prohibit covered jurisdictions from applying any test or device—usually a literary test [10]—as a precondition for registration to vote in any election. The statute does provide an escape from the proscriptions of the Act for jurisdictions falling within the formula, but only upon a proper showing that the statistical presumption of discrimination [11] has no actual application to them.

In stipulating the showing a covered jurisdiction must make in order to relieve itself from the Act's proscriptions, Congress declared that the plaintiff state or political subdivision must establish that no test or device had been used during the five years preceding the filing of the action "for the purpose *or with the effect* of denying or *abridging* the right to vote on account of race or color" (42 U.S.C. 1937b(a)) (emphasis added). The phrasing of the provision, particularly the use of the words "effect" and "abridging", makes clear that a covered jurisdiction

[10] See Section 4(c) of the Act (42 U.S.C. 1973b(c)).

[11] See H. Rep. No. 439, 89th Cong., 1st Sess., p. 13; South *Carolina* v. *Katzenbach*, *supra*, 383 U.S. at 330.

cannot escape Section 4's reach simply by showing the absence of deliberate discrimination during the pertinent five-year period. Thus, on the face of the statute, evidence of a course of conduct which has had the effect of abridging the right to vote on racial grounds, whether or not so intended, is sufficient to bar reinstitution of a literacy test. See *South Carolina* v. *Katzenbach, supra,* 383 U.S. at 326; *United States* v. *Alabama,* 252 F. Supp. 95, 104, (M.D. Ala.); *Sellers* v. *Trussell,* 253 F. Supp. 915, 917 (M.D. Ala.)

2. This reading of the statute is compelled by the nature of the evil which the Voting Rights Act was designed finally to eliminate. *South Carolina* v. *Katzenbach, supra,* 383 U.S. at 309, 315. Before deciding to adopt "sterner and more elaborate measures" such as the suspension of literacy tests (*id.* at 309), Congress "permissibly rejected" other alternatives, such as requiring of a complete reregistration of all voters (*Id.* at 334). Thus, Attorney General Katzenbach in his statement to the House Judiciary Committee formulated two principal reasons for suspending literacy tests rather than requiring a reregistration of voters, which explain the purpose and philosophy of the Act:

> To subject every citizen to a higher literacy standard would, inevitably, work unfairly against Negroes—Negroes who have for decades been systematically denied educational opportunity available to the white population.
>
> Such an impact would produce a real constitutional irony—that years of violation of the 14th amendment right of equal protection

through [un]equal education would become the excuse for continuing violation of the 15th amendment right to vote.

* * * * *

The second argument against such a re-registration "solution" is even more basic—and even more ironic. Even the fair administration of a new literacy test in the relevant areas would, inevitably, disenfranchise not only many Negroes, but also thousands of illiterate whites who have voted throughout their adult lives. Our concern today is to enlarge representative government. It is to solicit the consent of all the governed. It is to increase the number of citizens who can vote. What kind of consummate irony would it be for us to act on that concern—and in so doing reduce the ballot, to diminish democracy?

It would not only be ironic; it would be intolerable.[12]

---

[12] Hearings on H.R. 6400 Before Subcommittee No. 5 of the House Committee on the Judiciary, 89th Cong., 1st Sess., pp. 16–17 (hereinafter "*House Hearings*"). See also Hearings on S. 1564 before Senate Committee on the Judiciary, 89th Cong., 1st Sess., pp. 22–23 (Attorney General Katzenbach) (hereinafter "*Senate Hearings*"). Both houses of Congress, as the court below noted (A. 452, n. 13), indicated in the pertinent committee reports their apparent agreement with the position espoused by the Attorney General. Thus, the Senate noted that "the educational differences between whites and Negroes in the areas to be covered by the prohibitions * * * would mean that equal application of the tests would abridge 15th Amendment rights." S. Rep. No. 162, 89th Cong., 1st Sess., Pt. 3, p. 16 (1965) (hereinafter "Senate Report"). Similarly, the House stated that "even fair administration of the tests, following decades of discrimination * * * would simply freeze the present registration disparity created by past violations of the

Not only was Congress confronted with the fact of educational disparities which literacy tests were designed to capitalize upon; it was also well aware of the fact that such tests had been unfairly administered and were often coupled with devices specifically designed to allow whites of low literacy to escape a general ban on illiterate voters. *House Hearings,* p. 16; House Report, pp. 12–13; Senate Report, pp. 10–12; *South Carolina* v. *Katzenbach, supra,* 383 U.S. at 311–315. Accordingly, the solution chosen—suspension of such tests and devices in states and political subdivisions with low voter registration or turnout—was one designed to eradicate "once and for all the chronic system of racial discrimination which ha[d] for so long *excluded so many citizens from the electorate* because of the color of their skins, contrary to the explicit command of the 15th amendment" (Senate Report, p. 2) (emphasis added). See *South Carolina* v. *Katzenbach, supra,* 383 U.S. at 315. It is plain, then, that the Act's provisions are to be given a generous reading in order to achieve the basic congressional purpose. Cf. *Allen* v. *State Bd. of Elections,* Nos. 3 *et al.,* this Term, decided March 3, 1969.

"[Constitution]." H. Rep. No. 439, 89th Cong., 1st Sess., p. 15 (1965) (hereinafter "House Report"). In like vein, this Court noted in *South Carolina* v. *Katzenbach, supra,* 383 U.S. at 334, that "Congress knew that continuance of the tests and devices in use at the present time, no matter how fairly administered in the future, would freeze the effect of past discrimination in favor of unqualified white registrants."

In sum, the Voting Rights Act is result-oriented.[13] Having fallen within the coverage formula of Section 4, and the presumption of discrimination that the formula embodies (see *South Carolina* v. *Katzenbach, supra,* 383 U.S. at 330), Gaston County has a very heavy burden to carry in order to prevail in this action. It must show not only the absence of an improper purpose on the part of those of its officials who enforced the North Carolina literacy test, but also that, within the context of the educational opportunities available to its Negro citizens and the manner in which the literacy requirement was actually enforced, the test utilized until 1966 did not contribute to lim-

[13] We note that nothing this Court said in *Lassiter* v. *Northampton County Bd. of Elections*, 360 U.S. 45, a 1959 decision involving the North Carolina literacy test, is in conflict with the Voting Rights Act of 1965 or any of our present arguments (see A. 459, n. 22). While the Court there declined to declare the state statute unconstitutional on its face, it was careful to indicate that no issue as to "discrimination in the actual operation of the ballot laws of North Carolina" was before the Court (360 U.S. at 50). Moreover, as pointed out in *South Carolina* v. *Katzenbach*, *supra*, 383 U.S. at 333, the Court in *Lassiter* specifically recognized that "a literacy test, fair on its face, may be employed to perpetuate that discrimination which the Fifteenth Amendment was designed to uproot" (360 U.S. at 53). Indeed, almost in anticipation of the 1965 Act, the Court in *Lassiter* sanctioned only those standards relating to voting "which are not discriminatory and which do not contravene any restriction that Congress, acting pursuant to its constitutional powers, has imposed" (*id.* at 51). See also *Gray* v. *Sanders*, 372 U.S. 368, 379. While no improper utilization of literacy tests was charged in *Lassiter*, that is the crux of this case. Thus, the issue specifically reserved in *Lassiter* is now before the Court, in the context of an action brought under Section 4 of the Voting Rights Act of 1965.

iting the county's Negro electorate. Appellant's efforts to deprecate the substantiality of its burden are unconvincing. As the court below properly indicated, the essence of the case is whether appellant satisfactorily rebutted the government's evidence [14] that, during the five years preceding the filing of the suit, literacy tests had been used "with the effect of denying or abridging the right to vote on account of race or color" in Gaston County (see A. 448)

B. THE DISTRICT COURT PROPERLY CONCLUDED THAT THE USE OF A LITERACY TEST IN GASTON COUNTY, WHERE NEGROES NOW OF VOTING AGE WERE DISCRIMINATORILY AFFORDED INFERIOR AND INADEQUATE EDUCATIONAL OPPORTUNITIES, HAD THE EFFECT OF ABRIDGING THE RIGHT OF NEGROES TO VOTE ON ACCOUNT OF RACE

Here the district court had before it, as its opinion sets forth in detail, uncontradicted evidence as to differences between white and Negro educational opportunities during the entire period pertinent to this case (A. 453–456).[15] A comparison of the statistics re-

[14] See *South Carolina* v. *Katzenbach*, *supra*, 383 U.S. at 332, where the Court indicated that the burden was plainly on a jurisdiction seeking to be relieved from coverage to "refute whatever evidence to the contrary [of the allegation of nondiscrimination in the use of tests or devices for the past five years] may be adduced by the Federal Government."

[15] It is an anomaly that a State, like North Carolina, assumes the burden of public education (N.C. Const., Art. IX, § 2), and yet seeks to apply a test to determine the literacy of its citizens. At least where the individuals sought to be tested were educated in the state and the test is a fair one, it would appear that a state was virtually confessing the gross inadequacy of its own educational system by prescribing and administering such a test. See *Bazemore* v. *Bertie County Bd. of Elections*, 254 N.C. 398, 403, 119 S.E. 2d 637, 641, where the North Carolina Supreme Court stated that "there is little excuse for illiteracy in

lating to white and Negro educational opportunities as of the 1918–1919 school year is instructive.[16] The average annual salary of a Negro teacher that year was $113.64 as compared to $556.90 for a white teacher. The value of school property per Negro pupil was $12.74, as compared to $58.84 per white pupil. While Negroes constituted 21.77 percent of the pupil population, the salaries paid to their teachers amounted to only 3.9 percent of the total funds spent for teacher salaries and their schools were only valued at 5.6 percent of the total valuation of all school properties.

The state's figures for the 1918–1919 school year show that 98 percent of the white teachers—168 out of 171—but only 5 percent of the Negro teachers—two out of 38—held state teaching certificates.[17] The remaining 95 per cent of the Negro teachers held second grade certificates, described in the Biennial Report of the State Superintendent for that year as "the lowest permit issued in the State * * * not a certificate in the proper sense, but merely a permit to teach until

---

this State [since] North Carolina has a constitutional obligation to provide for the education of all its children," but perceived no incongruity in applying literacy tests despite this obligation.

[16] Fully 35 percent of the current voting-age population of the County were of school age in the pre-1918–1919 period (A. 454 n. 16).

[17] See Government Exhibit No. 2, which is comprised of excerpts from the Biennial Reports of the Superintendent of Public Instruction of North Carolina.

someone can be found who is competent to take the place." During this same period, 68 percent of the Negro children, but only 30 percent of the whites, attended one-room rural schoolhouses in which pupils in all grades were educated simultaneously by one teacher.

The conclusion is inescapable that a Negro born in 1912, who was in the first grade in 1918, had far less opportunity to acquire basic reading and writing skills than his white counterpart. The record is clear that, at least before 1930, educational disparities in Gaston County were dramatic and the Negro schools were not equipped to offer more than the most rudimentary educational training to the Negro children residing in the County.[18] Over 50 percent of the current Negro voting-age population of Gaston County was enrolled in the public schools during the pre-1930 period, and the evidence further showed that 30 per-

[18] The County sought, through the testimony of Thebaud Jeffers (A. 169), to establish that, even though inferior, the Negro schools were adequate to prepare one to pass the North Carolina literacy test. But Mr. Jeffers first came to Gaston County in 1932 and he had no knowledge about the quality of the Negro schools prior to that period of time (A. 142, 166). The statistics in the record relate that, though still inferior, beginning in approximately 1930 the Negro schools were upgraded to the extent that the disparities between those schools and the white schools were somewhat narrowed. Thus, at the very least, we submit that appellant failed to meet its burden of rebutting the government's evidence of the inadequacy of the educational opportunities afforded Negroes prior to 1930. See *South Carolina* v. *Katzenbach*, *supra*, 383 U.S. at 332.

cent of this population group achieved only a fourth-grade education (A. 454, N. 16, 455).

On the basis of these facts and others showing that Negroes now of voting age were afforded an education substantially inferior to that made available to their white contemporaries and that significant numbers of Negroes had attained levels of educational achievement substantially below that of their white contemporaries, the district court concluded that the imposition, during the five years preceding the filing of this action, of any literacy test would necessarily have had "the effect of abridging the right of many Negroes to vote on account of race or color" (A. 458).

In the absence of an effective rebuttal, that conclusion is unassailable. It is perhaps enough that the net effect of administering a literacy test for voting, however fairly, has been—and still would be—to disfranchise substantially more Negroes than whites. But whatever the significance of that fact if the result were entirely attributable to causes over which the state and its subdivisions had had no control, there can be no such issue here. The educational disparities prevailing in Gaston County are of course directly traceable to governmental policies of racial segregation and inequality for which official responsibility is inescapable. In these circumstances, as the district court said, "[i]t would be incongruous to allow a state or county to disenfranchise people for an ability to

pass a literacy test, when that ability was denied them as a result of discriminatory state action" (A. 459). That is, of course, merely an application of the well established constitutional rule that the Fifteenth Amendment precludes a state from disenfranchising a racially distinct group of citizens because they have not attained a status which is made a prerequisite for voting, when it has denied them an equal opportunity to achieve that status. See *Guinn* v. *United States*, 238 U.S. 347, and *Lane* v. *Wilson*, 307 U.S. 268. See also *Gomillion* v. *Lightfoot*, 364 U.S. 339, 346, 347–348.[19]

The same principle governs under the Voting Rights Act. In terms, Section 4 notices a discriminatory "effect," regardless of "purpose". And, as we

[19] In *United States* v. *State of Mississippi*, 229 F. Supp. 925, 990–993 (S.D. Miss.), reversed, 380 U.S. 128, Circuit Judge Brown, in a dissenting opinion which was generally approved by this Court, set forth in detail educational disparities which he regarded as "a direct element" of the government's case in challenging Mississippi's interpretation test for voting. Similarly, in *United States* v. *State of Texas*, 252 F. Supp. 234, 245 (W.D. Tex.), affirmed 384 U.S. 155, Circuit Judge Thornberry, in a case involving the constitutionality of the Texas poll tax, held that proof of educational disparities was a "legitimate means" for reaching a conclusion that an otherwise racially neutral requirement may be discriminatory. And in *Franklin* v. *Parker*, 223 F. Supp. 724 (M.D. Ala.), modified on other grounds, 331 F. 2d 841 (C.A. 5), a Negro had been denied admission to the graduate school of Auburn University on the ground that the college from which he had graduated was not accredited; all accredited colleges in Alabama were, however, limited to white students. Observing that a requirement of graduation from an accredited college, standing alone, was reasonable, the court found that its application where Negroes had been denied the opportunity to attend an accredited college as a result of discriminatory state action denied the plaintiff equal treatment on account of race.

have already pointed out, the existence of inferior educational opportunities for Negroes was a key consideration leading to the congressional determination to suspend literacy tests in the jurisdictions which fell within the coverage formula (*supra*, pp. 20–22). It was the view of the Attorney General and of Congress that it was unfair to allow a jurisdiction to disenfranchise people for a lack of capacity to pass a literacy test, when that capacity was denied them as a result of discriminatory governmental action. As the Senate Judiciary Committee put it (Senate Report, p. 16):

> [T]he educational differences between whites and Negroes in the areas to be covered by the prohibitions—differences which are reflected in the record before the committee—would mean that equal application of the tests would abridge 15th amendment rights. This advantage to whites is directly attributable to the States and localities involved.[20]

Unless Gaston County is to be allowed to do by indirection what it is forbidden to do directly by the Fifteenth Amendment (cf. *Lane* v. *Wilson*, *supra*, 307 U.S. at 275, *Terry* v. *Adams*, 345 U.S. 461) and disenfranchise Negroes for state-imposed educational dis-

---

[20] A comparable statement is that of Representative (now Senator) Goodell addressing the House (111 Cong. Rec. 5363):

"A State cannot in justice deprive any of its citizens of the vote because they have not achieved a given level of literacy and at the same time deny them the means of becoming literate."

See also, *e.g.*, 111 Cong. Rec. 15991 (Rep. Tunney), 16035 (Rep. Fraser), 16274 (Rep. Moorhead).

abilities, the teaching of prior judicial decisions and the legislative history of the statute surely supports the judgment below.[21]

---

[21] Gaston County argues in its brief (pp. 18–19) that Congress did not intend to suspend literacy tests in all states in which racially segregated school systems were at one time, or still are, extant, and that the opinion of the district court "obviates any opportunity for reinstatement of literacy tests in any state that has had a dual educational system." We submit that this is a rather selective assessment of what Congress accomplished in enacting the 1965 Act. Congress did suspend literacy tests in low registration states and counties in which such tests were in effect—through a formula which, by design, reached many dual-system jurisdictions—and, as we have shown, educational disparities were a significant reason for taking this action. Without abolishing literacy tests in dual-system states as such, Congress provided the framework for an adjudication on a case-by-case basis—in those states or sudivisions effected by the Voting Rights Act and seeking their release from its coverage—of the question which appellant seeks to avoid, *i.e.*, whether the *effect* of the use of a test, in the context of inferior educational opportunities available to Negroes in such suing states or subdivisions, is racially discriminatory. Whatever may be the situation in some other state or county which may seek release from the Act, the proof with respect to Gaston County compels a finding that the educational opportunities afforded its older Negro citizens were so inadequate and at the same time so inferior to those afforded to white persons, that, to quote the majority of the Senate Judiciary Committee, even "equal application of the tests would abridge 15th Amendment rights" (Senate Report, p. 16). As the court here pointed out, it sought to lay down no "all encompassing rule" but simply "reviewed the evidence adduced by the Government *in this case* and concluded that the Negro schools [in Gaston County] were of inferior quality in fact as well as in law" (A. 460, n. 23).

C. THE MANNER IN WHICH THE LITERACY TEST WAS ADMINISTERED HAD THE EFFECT OF CURTAILING NEGRO REGISTRATION WITHOUT HOLDING WHITE REGISTRATION WITHIN COMPARABLE LIMITATIONS

As this Court noted in *South Carolina* v. *Katzenbach, supra,* 383 U.S. at 334, a key factor in the decision of Congress to suspend literacy tests in areas where a low voter turnout implied the probability of discrimination was

> the feeling that states and political subdivisions which had been allowing white illiterates to vote for years could not sincerely complain about the "dilution" of their electorates through the registration of Negro illiterates. Congress knew that continuance of the tests and devices in use at the present time, no matter how fairly administered in the future, would freeze the effect of past discrimination in favor of unqualified white registrants. * * *

Few jurisdictions in any part of the country could have a more permissive record with regard to white registrants than Gaston County, North Carolina. Large numbers of white illiterates were allowed to register during the five-year period prior to the institution of the instant suit. And it is relevant that this was a direct continuation of a prior policy which was articulated in North Carolina's grandfather clause, which, in tandem with the literacy test, was orginally devised [22] as a means of circumventing the Fifteenth Amend-

[22] Evidence of original purpose is admissible in an action of this kind (*Apache County* v. *United States*, 256 F. Supp. 903, 910–911 (D. D.C.)), and sheds light on contemporary practices (*United States* v. *State of Louisiana*, 225 F. Supp. 353, 363, 381 (E.D. La.), affirmed, 380 U.S. 145, 152).

ment. See *South Carolina* v. *Katzenbach, supra,* 383 U.S. at 310–311; A. 449, n. 11. The role once played by the grandfather clause in exempting white persons from the requirements of state law has more recently been performed by the leniency of the registrar.

North Carolina law vests considerable discretion in the individual registrar with respect to the registration of voters. The State Constitution (Art. VI, § 4) requires every applicant for registration to be "able to read and write any section of the Constitution," and the law leaves to the registrar the judgment whether a particular applicant is able to do so. N.C. Gen. Stat. § 163–28. By decision of the Supreme Court of North Carolina, the literacy test need not be given to every applicant:

> It would be unrealistic to say that the test *must* be administered to all applicants for registration. For instance, it would be folly to require professors and teachers of political science, of known and recognized capabilities, to submit to the test. The statute only requires that the applicant *have* the ability. If the registrar in good faith knows that applicant has the requisite ability, no test is necessary. [*Bazemore* v. *Bertie County Board of Elections,* 254 N.C. 398, 406, 119 S.E. 2d 637, 643].

The law neither forbids nor requires registrars to register applicants in their homes. It neither compels them to go to registrants' homes to register them nor prohibits them from doing so. It permits, but does not compel, registrars to invite people to register.

All of these elements of discretion came into play

in Gaston County during the five-year period preceding the institution of this suit. The greatest area of discretion relates to the actual determination of literacy. The North Carolina Supreme Court has held in the *Bazemore* case, *supra*, that the requisite ability to read and write any section of the State Constitution (254 N.C. at 402, 119 S.E. 2d at 641)

> demands more than the mere ability to write one's own name and to recognize a few simple words * * * The standard or level of performance is the North Carolina Constitution. To be entitled to register as an elector one must be able to read and write any section thereof. Admittedly, the standard is relatively high, even after more than half a century of free public schools and universal education. * * *

The evidence in this case showed, however, that the actual policy of the County Board of Elections has been to interpret this requirement of North Carolina law with exceptional leniency; it likewise shows that the exercise of such leniency in practice, with respect to any given applicant, was a matter to be determined entirely, as a discretionary matter, by each individual registrar (A. 29, 31, 76).

The result is widespread registration of illiterate whites, at the present time, throughout the County (see note 6, *supra*). White citizens, registered in 18 different precincts widely scattered throughout the County from Cherryville in the northwest corner to Union in the southeast, including several in Gastonia as well, testified as to their inability to read and write more than their names and at most a few other words.

Twenty-one could not read anything at all except their names (see note 6, *supra*). At least fifteen of twenty-nine white deponents of low literacy affirmatively told the registrars at the time of their registration that they could not read or write (see A. 448–449). Moreover, there was further evidence on the basis of which the district court noted that those who testified "were not the only whites who were permitted to register although they were incapable of satisfying the literacy requirements of North Carolina law" (A. 449).

Publicity surrounding the 1962 county-wide reregistration did not, however, focus on this leniency; rather, it emphasized the fact that election officials were enforcing the North Carolina literacy law (A. 449, n. 10). The county election officials took no steps to notify the public of the extent to which they or the registrars were prepared to stretch the literacy requirement, nor did they publicize the fact that, for white applicants at least, the literacy requirement would be waived (A. 73). What is more, during the same period that white illiterates were being registered throughout Gaston County, Negro applicants for registration were required to demonstrate literacy. Negroes active in voter registration work were conducting literacy clinics (A. 417), or were screening illiterates from among those they encouraged to register (A. 458, n. 21); one Negro leader was told by a registrar not to bring illiterates to register (A. 314–315); other Negroes did not attempt to register because they believed they were insufficiently educated (A. 110, 458, n. 21). Even some of the Negro business-

men and professionals distributed in the Negro community copies of the test to be studied in preparation for registration (A. 110). In short, Negroes were led to believe that the literacy test was an actual standard for registration. The discriminatory impact of holding that belief is obvious.

Appellant sought to meet this proof of a rather general waiver of the literacy requirement for whites by trying to establish that the test was waived for Negroes as well as whites, and, to this end, it offered the depositions of several registered, low-literacy Negroes. However, every Negro witness of low literacy called to testify on behalf of the County was registered in Precinct No. 7 of the City of Gastonia—the only precinct in which there is now and ever was a Negro registrar, in which three Negro deputy registrars were appointed in 1962, and in which night registration was conducted at the request of Negro leaders. Appellant did not show any waiver of the test for a single Negro outside the City of Gastonia, or even outside the one predominantly Negro precinct to which the evidence of cooperation with Negro groups is restricted.

Although the district court did not base its finding that Gaston County's enforcement of the literacy test had had a discriminatory effect upon the right of its Negro citizens to vote on the ground of discriminatory application,[23] and its finding of a discriminatory

[23] Rather, the court below discussed the respective contentions on this point and, in response thereto, stated that "we find it unnecessary to determine whether purposeful discrimination within the meaning of Section 4(a) has been practiced in Gas-

effect because of inferior educational opportunities is a fully adequate ground upon which to affirm the judgment, we believe that the practice of waiving the literacy test for whites without publicizing the policy of waiver in the Negro community similarly had the proscribed discriminatory effect.[24]

---

ton County since April 1962" (A. 450). However, it was not the government's intention to limit the evidence regarding discriminatory application of the literacy requirement to the question whether those practices were simply "for the purpose" of denying or abridging the right to vote on racial grounds. Rather, apart from whether "purposeful discrimination" was adequately shown, it is our submission that this evidence at least shows that literacy tests were applied in Gaston County during the critical five-year period "with the effect" of denying or abridging the right of Negroes to vote. That, under Section 4(a), is a sufficient basis for denying appellant the relief sought, and provides an indepedent ground for affirmance of the judgment below.

[24] Gaston County can derive no benefit from Section 4(d) of the Act (42 U.S.C. 1973b(d) (see App. Br., p. 19.) The district court found that Gaston County's literacy test had the effect of abridging the right to vote on account of race not because of isolated individual incidents of discrimination, but because the use of the test in the context of Gaston County's denial of equal educational opportunities to Negroes, made registration for Negroes, as a class, more difficult than it was for whites. Moreover, the waiver of the literacy requirement for white persons in all parts of the county cannot reasonably be characterized as being composed of incidents which were "few in number." Leniency by the registrars was, on the contrary, simply a continuation of a tradition first implemented by the grandfather clause.

In order to come within the terms of Section 4(d), appellant was also required to show that the discrimination has been promptly and effectively corrected by state or local action, that its continuing effect has been eliminated, and that there is no reasonable probability of recurrence. In view of the proof

II. GASTON COUNTY FAILED TO MEET ITS BURDEN OF PROVING THAT ENFORCEMENT OF THE LITERACY TEST BY MUNICIPAL REGISTRARS OPERATING WITHIN ITS TERRITORIAL LIMITS DID NOT HAVE A DISCRIMINATORY PURPOSE OR EFFECT

The Voting Rights Act suspends the use of literacy tests in *all* elections—federal, state and local—within a covered State or political subdivision. Thus, the certification of Gaston County prohibited the use of a literacy test as a precondition to registration or voting not only in county-wide elections, supervised by the Gaston County Board of Elections, but also in all municipal, township and other elections conducted within the County's boundaries; and, conversely, if the County were released from the Act's coverage by declaratory judgment, municipal regis-

---

of educational discrimination, none of these requirements has been met. A literacy test if reintroduced would continue to bear more heavily on Negroes than on whites. With respect to the policy of selective waiver, no corrective efforts have been made; on the contrary, the Chairman of the Board of Elections explicitly testified that he had no plans for removing from the rolls illiterates who were registered while the test was in effect (A. 72) and, in fact, that he had no intention of changing prior practices at all (A. 73).

Section 4(d) serves a useful purpose. If, for example, the literacy test had been given to all applicants, if all had received equal educational opportunities, and if a few isolated Negroes had been originally rejected for registration but then registered, with adequate safeguards against recurrence, the situation would be one of the kind to which Section 4(d) is addressed See *Apache County* v. *United States*, 256 F. Supp. 903 (D. D.C.). Where, as here, the issue pertains to an entire pattern of conduct by the appellant, as to which no corrective steps are contemplated, Gaston County can obtain no assistance from this provision.

trars would be legally free to resume the application of a literacy test. Under the statute, therefore, it was incumbent on the County, as a part of its *prima facie* case, to make a showing that the literacy test has not been used during the relevant period by any registrar or election board operating within the County with a discriminatory purpose or effect (see A. 463–465). Appellant has offered no such proof; rather, the County's witnesses below disclaimed all knowledge of, or responsibility for, registration for municipal elections.

In its brief the County contends that no such proof is required (pp. 22–23), asserting that the Act never became effective with respect to the municipalities in Gaston County because none of them was separately certified by the Attorney General and the Director of the Census. It asserts that this construction should be adopted because the County cannot reasonably be expected to provide proof concerning the racial fairness of registration and elections within its boundaries which are not subject to its direct supervision. This contention misconceives the scheme of the Act.

Section 4 of the Voting Rights Act provides in pertinent part that "no citizen shall be denied the right to vote in any Federal, State or local election because of his failure to comply with any test or device * * * in any political subdivision [which has been certified under the Act]." Certainly the literal application of these words applies to municipal elec-

tions. Thus, it seems plain that a municipal registrar in Cherryville (in Gaston County) may not deny the right to vote (for failure to pass a literacy test) to a potential municipal elector in elections *in* Gaston County, when the County has been so certified. Moreover, the portion of this section dealing with actions to remove the restrictions of the Act makes it clear that the word "in" is used in a geographical or territorial sense; it is there provided that no declaratory judgment may issue if any court of the United States has entered a judgment, during the preceding five years, to the effect that the right to vote has been discriminatorily denied or abridged "anywhere in the territory of such plaintiff" (42 U.S.C. 1973b(a)).

Appellant's proposed construction of the Act is inconsistent not only with the statutory language, but also with its legislative history [25] and its administra-

[25] That the framers of the law had no intention of enfranchising a citizen for one election but not for another is established by an exchange between Attorney General Katzenbach and Chairman Celler of the House Judiciary Committee. After a discussion of the question of what constituted a certifiable subdivision, in which the Attorney General indicated that, in southern states, this would ordinarily be a county, the following colloquy ensued:

> *The Chairman.* This bill covers Federal, State, and municipal elections. Would it cover an election for a school board?
>
> *Mr. Katzenbach.* Yes; it would, Mr. Chairman. Every election in which registered electors are permitted to vote would be covered by this bill [*House Hearings*, p. 21].

See also *id.* at 50; *Senate Hearings*, p. 162; Senate Report, p. 16.

tive[26] and judicial construction.[27] It is, moreover, wholly unrealistic. It implies that the Act will operate to eliminate literacy test barriers only after a separate certification by the Attorney General and by the Director of the Census of each of Gaston County's eleven municipalities; and, presumably, every school election district, township and hamlet in each of six covered states, and in some fifty other covered counties. In the absence of an express directive, we cannot assume the Congress meant to establish such a complex and unworkable rule.

Appellant, however, contends that an unreasonable burden is cast upon it if it is required to prove, *prima facie,* that the use of tests everywhere within its boundaries has been without racially discriminatory effect. But that is certainly the burden which a state,

---

[26] The administrative construction of the statute by the Civil Service Commission, the agency charged with its enforcement, is likewise to the effect that certification of a state or subdivision suspends tests or devices for all elections within the unit. See, *e.g.*, 45 C.F.R. § 801.204, Appendix B. The Commission's construction of the statute is, of course, entitled to great weight. See *Udall* v. *Tallman*, 380 U.S. 1, 16.

[27] *United States* v. *Mississippi*, 256 F. Supp. 344, 349 (S.D. Miss.) Cf. *Allen* v. *State Bd. of Elections*, Nos. 3, et al. this Term, decided March 3, 1969, wherein the Court held that the adoption of new voting procedures by counties within the certified state of Mississippi came within the proscriptions of Section 5 of the Act by virtue of the State's coverage under Section 4, and *Hadnott* v. *Amos*, No. 647, this Term, decided March 25, 1969, wherein a similar result was reached in a case arising in Alabama.

covered as a whole, must assume: the state may not obtain exemption by demonstrating that some central election board has applied a literacy test without discriminatory purpose or effect, albeit local officials have done otherwise. And the same rule governs when the applicant for exemption is a county, separately covered. The fact is that the Voting Rights Act adopts a geographical and not a jurisdictional standard; and its provision for suit by the covered political subdivision, here the County, rather than suits by or on behalf of any particular election authority, is entirely consistent with the structure of the coverage sections.

The burden upon the County to submit evidence concerning these elections is in no respect unreasonable and could easily have been undertaken by simply offering the testimony of the several municipal registrars. Having alleged in its complaint, following the statutory language, that "* * * no test or device * * * has been used in the plaintfff county during the five (5) years preceding * * * with the effect of * * * abridging the right to vote on account of race or color," it offered evidence with respect to the use of tests by only one of at least twelve election authorities which functioned within its borders. Accordingly, appellant has failed in proving the central allegation of its complaint. While the Court need not reach this issue in order to affirm the judgment below, we believe, as the concurring opinion of Judge Gasch in

the district court points out, this defect alone is fatal (A. 465) and precludes the issuance of the declaratory judgment sought by the County.[28]

[28] We note, in conclusion, that because illiterate persons are now registered voters in Gaston County, the United States raised in its Answer below the defense that, independently of the provisions of the Voting Rights Act, the reinstitution of a literacy test would be inconsistent with the provisions of Section 101(a) of the Civil Rights Act of 1964, as amended by Section 15(a) of the Voting Rights Act of 1965 (42 U.S.C. 1971(a)(2)(A)), at least in the absence of a complete re-registration of all voters which would purge registered illiterates from the rolls. This section provides in pertinent part that no person acting under color of law shall,

> in determining whether any individual is qualified under State law or laws to vote in any election, apply any standard, practice, or procedure different from the standards, practices, or procedures applied under such law or laws to other individuals within the same county, parish, or similar political subdivision who have been found by State officials to be qualified to vote. * * *

Since the plain language and purpose of this section precludes appellant from using any test different from or more exacting than that in effect in the County prior to the Voting Rights Act, appellant is barred, quite apart from the effect of the Voting Rights Act, from once again conditioning registration on literacy. Cf. *United States* v. *Duke*, 332 F. 2d 759 (C.A. 5); *United States* v. *State of Louisiana*, 225 F. Supp. 353 (E.D. La.), affirmed, 380 U.S. 145; *United States* v. *Cox*, 11 Race Rel. L. Rep. 269, 288 (N.D. Miss.).

The district court, while agreeing with our argument that amended Section 101(a) precludes reinstitution of a literacy test in the absence of a total reregistration (A. 450–452), did not rest its decision on this ground. Indeed, such a finding would not defeat the claim for exemption from the interdictions of the Voting Rights Act, and the issue becomes revelant only if it is found that a declaratory judgment in favor of appellant is warranted. In that event, Section 101(a) would prevent the court from "licensing" the reinstitution of a literacy test in Gaston County.

CONCLUSION

For the foregoing reasons, the judgment below should be affirmed.

Respectfully submitted.

ERWIN N. GRISWOLD,
Solicitor General.
JERRIS LEONARD,
Assistant Attorney General.
LOUIS F. CLAIBORNE,
FRANCIS X. BEYTAGH, JR.,
Assistants to the Solicitor General.
DAVID L. NORMAN,
GARY J. GREENBERG,
Attorneys.

APRIL 1969.

U. S. GOVERNMENT PRINTING OFFICE: 1969